

DONNA S. TAMANAHA (WI 1013199)
Assistant United States Trustee
LYNETTE C. KELLY (SBN 120799)
Trial Attorney
MARTA E. VILLACORTA (NY SBN 4918280)
Trial Attorney
United States Department of Justice
Office of the U.S. Trustee
450 Golden Gate Avenue, Suite 05-0153
San Francisco, CA 94102
Telephone: (415) 705-3333
Facsimile: (415) 705-3379
Email: lynette.c.kelly@usdoj.gov;
marta.villacorta@usdoj.gov

Attorneys for James L. Snyder,
Acting United States Trustee for Region 12¹

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re)	Case No. 19-30088 DM
PG&E CORPORATION,)	Chapter 11
)	
Debtor-in-Possession.)	

In re)	Case No. 19-30089 DM
PACIFICE GAS AND ELECTRIC COMPANY,)	Chapter 11
)	
Debtor-in-Possession.)	

**OBJECTION OF THE UNITED STATES TRUSTEE TO MOTION OF THE
DEBTORS PURSUANT TO BANKRUPTCY CODE SECTIONS 105(A)
AND 107(B) AND BANKRUPTCY RULE 9018 FOR ENTRY OF AN ORDER
AUTHORIZING THE FILING UNDER SEAL OF THE PROPOSED
DEBTOR-IN-POSSESSION FINANCING FEE LETTERS**

¹ James L. Snyder, Acting United States Trustee for Region 12, is acting in this appointment for Tracy Hope Davis, United States Trustee for Region 17, who has recused herself.

1 The United States Trustee for Region 17 (the “**United States Trustee**”) files the
2 following objection to the Motion (ECF No. 25, the “**Seal Motion**”) of PG&E Corporation
3 (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the “**Utility**”), as debtors and debtors
4 in possession (collectively, “**PG&E**” or the “**Debtors**”) in the above captioned chapter 11 cases
5 (the “**Chapter 11 Cases**”), to permit the Debtors to file under seal certain fee letters (the “Fee
6 Letters”) in support of the Debtors’ Motion Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and
7 507, and Fed. R. Bankr. P. 2002, 4001, 6004 and 9014 for Interim and Final Orders (I)
8 Authorizing the Debtors to Obtain Senior Secured, Superpriority, Postpetition Financing, (II)
9 Granting Liens and Superpriority Claims, (III) Approving Use of Cash Collateral of Prepetition
10 Bridge Secured Parties, (IV) Granting Adequate Protection to Prepetition Bridge Secured Parties
11 and (V) Scheduling Final Hearing (ECF No. 23, the “**DIP Financing Motion**”). The Debtors’
12 request to file the Fee Letters under seal contravenes Bankruptcy Code Section 107 and,
13 therefore, should be denied. In support of his objection, the United States Trustee alleges as
14 follows:
15
16
17

18 I. **Background**

19 1. On January 29, 2019 (the “Petition Date”), the Debtors filed voluntary petitions
20 for relief under Chapter 11 of the Bankruptcy Code.

21 2. The United States Trustee has not appointed an official Committee of
22 Unsecured Creditors. An organizational meeting to do so is scheduled for February 11, 2019,
23 at 10:00 a.m. at the Office of the U.S. Trustee, 450 Golden Gate Avenue, Suite 01-5467, San
24 Francisco, CA 94102.

25 3. On the Petition Date, the Debtors filed the Seal Motion, along with an
26 accompanying DIP Motion.
27
28

1 4. In the Seal Motion, the Debtors seek to file the following under seal:

2 (i) Fee Letter, dated as of January 21, 2019, by and among the Utility and J.P.
3 Morgan Securities LLC and acknowledged by Merrill Lynch, Pierce,
4 Fenner & Smith, Incorporated, Barclays Bank PLC and Citigroup Global
5 Markets, Inc.

6 (ii) Fee Letter, dated as of January 21, 2019 (the “Underwriting Fee Letter”) by and among the Utility, J.P. Morgan Securities LLC, Merrill Lynch,
7 Pierce, Fenner & Smith Incorporated, Barclays Bank PLC and Citigroup
8 Global Markets Inc.

9 Seal Motion at p. 4.

10 5. Of apparent specific concern are “market flex” provisions in the Underwriting
11 Fee Letter. Seal Motion at p. 4.

12 **II. Jurisdiction and Standing**

13 6. This Court has jurisdiction to hear this objection.

14 7. Pursuant to 28 U.S.C. §586, the U.S. Trustee is charged with the administrative
15 oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code. This
16 duty is part of the U.S. Trustee’s overarching responsibility to enforce the bankruptcy laws as
17 written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas*
18 *Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the
19 U.S. Trustee has public interest standing under 11 U.S.C. §307, which goes beyond mere
20 pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498,500
21 (6th Cir. 1990) (describing the U.S. Trustee as a watchdog).

22 8. Pursuant to 11 U.S.C. §307, the U.S. Trustee has standing to be heard with regard
23 to this objection.

24 **III. Applicable Law**

25 The Supreme Court stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591
26
27
28

1 (1978): “It is clear that the courts of this country recognize a general right to inspect and copy
2 public records and documents, including judicial records and documents.” Unanimity in the case
3 law demonstrates that there is common law right of access to judicial proceedings and to inspect
4 judicial records in civil matters. *In Orion Pictures Corp. v. Video Software Dealers Assoc.*, 21
5 F.3d 24 (2d Cir. 1994), the court stated the general rule as: “...a strong presumption of public
6 access to court records... This preference for public access is rooted in the public’s first
7 amendment right to know about the administration of justice. It helps safeguard the integrity,
8 quality, and respect in our judicial system.” 21 F.3d 24, 26 (citations omitted). *See also, In re*
9 *Continental Airlines*, 150 B.R. 334 (D.Del 1993), where the court noted, ...the strong presumption
10 in favor of public access to judicial records and papers...”. Accord, *In re Foundation for*
11 *New Era Philanthropy*, 1995 WL 478841 (E.D. Pa. 1995); *In re Barney’s Inc.*, 201, B.R. 703
12 (Bankr. S.D.N.Y. 1996).

13
14
15 Section 107(a) has been viewed as codifying the common law right of public access to
16 court records. The statute provides:

17
18 “(a) Except as provided in subsections (b) and (c) of this section and subject to
19 section 112, a paper filed in a case under this title and the dockets of a
20 bankruptcy court are public records and open to examination by an entity at
reasonable times without charge.”

21 Section 107(b)(1) provides limited exceptions to the statutory right of public access to
22 certain specified kinds of information, and one of those exceptions is for “confidential
23 commercial information”:

24 “(b) On request of a party in interest, the bankruptcy court shall, and on the
25 bankruptcy court’s own motion, the bankruptcy court may –
26 (1) protect an entity with respect to a trade secret or confidential research,
27 development, or commercial information; . . .

28 Federal Rule of Bankruptcy Procedure 9018 provides the procedural mechanism for

1 seeking protective relief:

2 “On motion or on its own initiative, with or without notice, the court may make
3 any order which justice requires (1) to protect the estate or any entity in respect of
4 a trade secret or other confidential research, development, or commercial
5 information . . . “

6 The burden is on the movants to demonstrate that the interest in secrecy outweighs the
7 presumption in favor of access. *Bank of America Nat’l Trust & Savings Assoc. v. Hotel*
8 *Rittenhouse Associates*, 800 F.2d 339, 344 (3d Cir. 1986); *In re Continental Airlines*, 150 B.R.
9 334, 340 (D. Del. 1993).

10 “Confidential commercial information” is not a defined term within the Bankruptcy
11 Code, but it has been addressed in the case law addressing Section 107(b)(1). “Confidential
12 commercial information” is “information which would result in ‘an unfair advantage to
13 competitors by providing them information as to the commercial operations of the [entity].” *In*
14 *re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del. 2006) (Walrath, J.) (citing *In re*
15 *Orion Pictures Corp.*, 21 F.3d 24, 27-28 (2d Cir. 1994) and *Ad Hoc Protective Comm. For 10*
16 *½% Debenture Holders v. Itel Corp. (In re Itel Corp.)*, 17 B.R. 942, 944 (9th BAP 1982)). The
17 disclosure of such information must “reasonably be expected to cause the entity commercial
18 injury.” *Alterra*, 353 B.R. at 75 (citing *In re Northstar Energy, Inc.*, 315 B.R. 425, 429 (Bank.
19 E.D. Tex. 2004) and *In re Global Crossing, Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003)).
20 “Moreover, the Court must find that information contained in the . . . [documents] . . . ‘is so
21 critical to the operations of the entity seeking the protective order that its disclosure will unfairly
22 benefit that entity’s competitors.’” *Alterra*, 353 B.R. at 75-76 (quoting *In re Barney’s, Inc.*, 201
23 B.R. 703, 708-09 (Bankr. S.D.N.Y. 1996)). Information is not “‘commercial’ within the meaning
24 of § 107(b) merely because it relate[s] to business affairs.” *In re Northwest Airlines Corp.*, 363
25
26
27
28

1 B.R. 704, 706 (Bankr. S.D.N.Y. 2007). It must be “information which would give a competitor
2 an unfair advantage.” *Id.* (quoting *In re Handy Andy Home Improvement Centers, Inc.*, 199 B.R.
3 376, 382 (Bankr. N.D. Ill. 1996).

4
5 The sealing analysis should also take into account whether the filings are made pursuant
6 to bankruptcy rules specifically requiring the public disclosure of information. *See Northwest*
7 *Airlines*, 363 B.R. at 707-08 (“we start with the fact that Bankruptcy Rule 2019 is a disclosure
8 rule”). *In re Foundation for New Era Philanthropy*, 1995 WL 478841 (Bankr. E.D. Pa. May 18,
9 1995) (disclosure of creditor list required under Fed. R. Bankr. P. 1007).

10
11 One of the hallmarks of bankruptcy law is the full and extensive disclosure required of
12 debtors with respect to their financial affairs. For debtor-in-possession financing, Federal Rule of
13 Bankruptcy Procedure 4001(c) sets forth the required disclosures. Rule 4001(c)(1)(B) specifically
14 provides:

15 The motion shall ... begin with a concise statement of the relief requested ... that lists
16 or summarizes, and sets out the location within the relevant documents of, all
17 material provisions of the proposed credit agreement and form of order, including
18 interest rate, maturity, events of default, liens, borrowing limits, and borrowing
conditions.

19 This rule is supplemented by Northern District of California Guidelines for Cash
20 Collateral & Financing Motions & Stipulations (Effective 1/1/2006) at
21 <http://www.canb.uscourts.gov/procedure/guidelines-cash-collateral-financing-motions->
22 [stipulations-effective-112006](http://www.canb.uscourts.gov/procedure/guidelines-cash-collateral-financing-motions-stipulations-effective-112006). The Guidelines contain, among other things requirements for
23 disclosure of all material provisions of a borrowing agreement.
24

25 **IV. The Debtors Have Not Sustained Their Burden of Proof**

26 In the Seal Motion, the Debtors assert that the Fee Letters in their entirety constitute
27 proprietary information not typically disclosed to the public or to competing financial
28

1 institutions. Seal Motion at 6, 7. The parties do not want the Fee Letters disclosed because
2 “the Debtors and Commitment Parties” simply agreed to this. Seal Motion at 4. Such
3 assertions do not demonstrate that the information set forth in the Fee Letters is, in fact,
4 commercially sensitive information. Contrary to the Debtors’ assertions, it is routine to
5 disclose the terms of DIP Motion. Disclosure of information related to the fees and charges is
6 essential to the parties’ ability to determine whether the loans are in the best interests of the
7 estate and its creditors. As bankruptcy is a transparent process, creditors and other parties in
8 interest have the right to review such information. This is consistent with the required
9 disclosure of other payments by debtors are also routinely disclosed as part of the bankruptcy
10 process, including the statement of financial affairs and the monthly operating reports.
11

12
13 Even if the Debtors can successfully demonstrate that there may be one or more terms of
14 the Fee Letters that may be protected under Section 107(b) or Rule 9018, the relief granted
15 should be narrowly tailored. *See In re Lomas Financial Corporation*, 1991 WL 21231, at *2
16 (S.D.N.Y. 1991). At the very most, the so called “Flex Market” information that comports with
17 the requirements of either Section 107 (b) or FRBP 9018 should be redacted and sealed on a
18 temporary basis, with the right of the parties to revisit the issue after a Committee is appointed
19 in these cases.
20

21 **V. Conclusion**

22 The Bankruptcy Code and Rules place narrow limits upon sealing documents. The
23 requirements of the Bankruptcy Code and Rules express the necessary public interest in this
24 matter requiring full disclosure.
25

26 ///

27 ///

1 WHEREFORE, the United States Trustee requests that the Court deny the Seal Motion
2 and grant such other and further relief as the Court deems appropriate.

3 Dated: January 31, 2019

4 James L. Snyder
Acting United States Trustee, Region 12

5 /s/ Lynette C. Kelly
6 Trial Attorney